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92-486

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION,
PETITIONERS

v.

EDGE BROADCASTING COMPANY,
T/A POWER 94

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether 18 U.S.C. 1304 and 1307, which restrict the right of a radio or television licensee to broadcast lottery-related advertisements, violate the First Amendment Free Speech Clause when applied to a licensee operating in a State that prohibits lotteries, but whose broadcasts extend into a State that operates a state lottery.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes, and rule: Page

Miscellaneous:

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The Solicitor General, on behalf of the United States and the Federal Communications Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, App., *infra*, 1a-9a, is unpublished, but the judgment is noted at 956 F.2d 263 (Table). The opinion of the district

court, App., *infra*, 10a-38a, is reported at 732 F. Supp. 633.

JURISDICTION

The judgment of the court of appeals was entered on February 27, 1992. A petition for rehearing was denied on May 20, 1992. App., *infra*, 40a-41a. On August 5, 1992, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including September 17, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment and 18 U.S.C. 1304 and 1307 are reprinted in an appendix to this petition. App., *infra*, 42a-44a.

STATEMENT

This is a First Amendment challenge by a radio licensee to Congress's regulation of the use of the airwaves to promote state-run lotteries. See 18 U.S.C. 1304 and 1307. Together, Section 1304 and Section 1307 create a bright-line geographic rule, under which a station's right to broadcast lottery advertising hinges on the State to which it is licensed: A station broadcasting from a State with a state-run lottery can broadcast advertisements about that State's lottery, or about any other state-run lottery. By contrast, a station broadcasting from a State without a state-run lottery cannot broadcast advertisements about any state-run lottery. The validity of that bright-line rule is at issue in this case.

A. Historical And Statutory Background

Congressional restrictions on lotteries date from 1827.[1] In that year, Congress prohibited postmasters from serving as lottery agents and from receiving "lottery schemes, circulars, or tickets" free of postage. Act of Mar. 2, 1827, ch. 61, § 6, 4 Stat. 238. Forty-one years later, Congress made it a crime to deposit in the mails "any letters or circulars concerning lotteries, so-called gift concerts, or other similar enterprises offering prizes of any kind on any pretext whatever." Act of July 27, 1868, ch. 246, § 13, 15 Stat. 196. In 1872, Congress limited the prohibition to the mailing of letters or circulars concerning illegal lotteries. Act of June 8, 1872, ch. 335, § 149, 17 Stat. 302. Four years later, however, Congress

[1] In pre-colonial England and during the early history of this nation, lotteries were a popular and respectable activity. See Blakey & Kurland, *The Development of the Federal Law of Gambling*, 63 Cornell L. Rev. 923 (1978); J. Ezell, *Fortune's Merry Wheel: The Lottery in America* 1-59 (1960); G. Sullivan, *By Chance a Winner: The History of Lotteries* (1972). Beginning in the Jacksonian period, lotteries fell into disfavor for various reasons, such as "animosity toward legislatively-created privilege, concern for efficiency in government, distaste for fraud and corruption, and sympathy for the poor upon whom the burden of the lottery system was thought to fall." Blakey & Kurland, *supra*, 63 Cornell L. Rev. at 927. A major obstacle to reform efforts by the States was their inability to regulate lotteries that operated across state lines. States lacked authority to prosecute lotteries conducted in another jurisdiction or to regulate use of the mails to distribute lottery tickets and advertisements. Because States had to attack lotteries within their borders "at the consumer level—a difficult, expensive, and unpopular task," Blakey & Kurland, *supra*, 63 Cornell L. Rev. at 931—they turned to Congress for help.

again extended the prohibition to all lotteries, including ones chartered by state legislatures. Act of July 12, 1876, ch. 186, § 2, 19 Stat. 90 (codified at Rev. Stat. § 3894 (2d ed. 1878)).

The 1876 Act was challenged on the ground that it violated the First Amendment, but this Court rejected that argument in *Ex parte Jackson*, 96 U.S. 727 (1878). Nevertheless, that law was widely viewed as an ineffective weapon against lotteries, particularly the then-infamous and powerful Louisiana Lottery, the only one still operating legally in 1890.[2] Because the Attorney General had concluded that the 1876 Act did not apply to newspapers,[3] that law did not stop the Louisiana Lottery from soliciting customers through newspaper advertisements.

After several years of debate,[4] Congress closed that loophole by passing the Anti-Lottery Act of 1890, ch. 908, § 1, 26 Stat. 465 (codified at Rev. Stat. § 3894 (Supp. 2d ed. 1891)). The constitutionality of that law was challenged in *In re Rapier*, 143 U.S. 110 (1892), and, relying on *Ex parte Jackson*, *supra*, the Court upheld the Act over a First Amendment objection. In response, the Louisiana Lottery moved its operations to Honduras and used a Florida express

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[2] *Exclusion of Lotteries from Postal Facilities*, 17 Op. Att'y Gen. 77, 77 (1881); see 21 Cong. Rec. 8714-8717 (1890) (summary of state laws prohibiting lotteries); 21 Cong. Rec. 8714 (1890) (Rep. Evans).

[3] *Lotteries—Non-Mailable Matter*, 18 Op. Att'y Gen. 306, 309 (1885).

[4] There was considerable debate on whether applying the 1876 Act to newspapers would violate the First Amendment. See J. Ezell, *supra*, at 251-263; Blakey & Kurland, *supra*, 62 Cornell L. Rev. at 937-940.

company for its domestic business.[5] When Congress realized that the Louisiana Lottery still had not been shut down, Congress passed the Act of March 2, 1895, ch. 191, 28 Stat. 963 (codified at 18 U.S.C. 1301), which outlawed transportation of lottery tickets in interstate or foreign commerce. The constitutionality of that Act was also challenged, and this Court, for the third time, upheld Congress's anti-gambling efforts in *Champion* v. *Ames (No. 2) (Lottery Case)*, 188 U.S. 321 (1903), this time over a claim that the statute exceeded Congress's power under the Commerce Clause, Art. I, § 8, Cl. 3.

2. The 19th century federal anti-lottery legislation is still in effect today with respect to privately-run lotteries. The basic prohibition on the mailing or carrying in interstate commerce of lottery tickets or lottery advertisements survives as 18 U.S.C. 1301 and 1302. After the birth of radio and television, Congress enacted Section 316 of the Communications Act of 1934, ch. 652, 48 Stat. 1088, which bars radio and television stations from broadcasting "any advertisement of or information concerning any lottery, gift enterprise, or similar scheme." 18 U.S.C. 1304. The Federal Communications Commission can revoke a broadcaster's license for violating Section 1304. 47 U.S.C. 312(a)(6). These sections in the Postal and Communications Codes generally outlaw use of the mails and the airwaves to promote privately-run lotteries.[6]

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[5] J. Ezell, *supra*, at 263-264, 267-268; G. Sullivan, *supra*, at 58; Blakey & Kurland, *supra*, 63 Cornell L. Rev. at 940; see *Report of the Postmaster-General*, H.R. Exec. Doc. No. 1, 52d Cong., 1st Sess. Pt. 4, at 17 (1891).

[6] Related provisions of Title 18 include: Section 1303, which prohibits any Postal Service officer or employee from

On the other hand, Congress has modified this regulatory scheme to reflect the renaissance of state-operated lotteries. In 1975, after the rebirth of state-run lotteries in New Hampshire, New Jersey, and New York, Congress allowed newspapers and broadcasters to advertise such lotteries if the newspaper or broadcast licensee is located in a State with a state-run lottery. See 18 U.S.C. 1307. Section 1307, as amended, permits advertising about state-sponsored lotteries "by a radio or television station licensed to a location in that State or in a State which conducts such a lottery." 18 U.S.C. 1307(a)(1)(B). Congress adopted that exemption "to accommodate the operation of legally authorized State-run lotteries consistent with continued Federal protection to the policies of non-lottery States." S. Rep. No. 1404, 93d Cong., 2d Sess. 2 (1974). Congress sought to "mak[e] a reasonable balance between Federal and State interests in this area," including "the consideration and protection of the policies and interests of the States which do not provide for such lotteries." H.R. Rep. No. 1517, 93d Cong., 2d Sess. 5 (1974).

3. This controversy over the constitutionality of 18 U.S.C. 1304 and 1307 arises from the opposing lottery policies of Virginia and North Carolina. North Carolina does not operate a state-run lottery and prohibits lotteries and lottery advertising. N.C. Gen. Stat. §§ 14-289, 14-290 (1991). By contrast, Virginia has had a state-conducted lottery since 1987, when

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acting as a lottery agent; Section 1305, which creates a special exemption for fishing contests; Section 1306, which bars financial institutions from selling lottery tickets for state-operated lotteries. Provisions in the Postal Code establish a procedure by which the Postal Service can refuse to deliver lottery-related materials. 39 U.S.C. 3001-3007.

Virginia voters approved a lottery referendum. Va. Code Ann. § 58.1-4001 (1992). The Virginia State Lottery Board spends millions of dollars each year on broadcast and print media lottery advertising, and private Virginia businesses purchase radio advertising identifying their status as lottery ticket outlets. App., *infra*, 2a-3a, 12a-13a; C.A. App. 185-187, 196. Under 18 U.S.C. 1304 and 1307, a broadcasting station licensed to Virginia locations may carry Virginia lottery advertisements, but a station licensed to North Carolina locations may not, even if its service area extends into Virginia.

B. The Proceedings In This Case.

1. Respondent is a broadcasting corporation with studio and corporate offices in Virginia Beach, Virginia. Respondent is licensed by the FCC to operate an FM radio station in Elizabeth City, North Carolina. The station, whose call sign is WMYK (Power 94), broadcasts from Moyock, North Carolina, approximately three miles from the North Carolina-Virgina border. Due to its location, WYMK broadcasts to residents of both States. Roughly 127,000 North Carolina residents live in WMYK's service area. Approximately 8% of its listeners reside in North Carolina, with the remainder in Virginia. WYMK's listeners comprise a small percentage of North Carolina's total population, and most of them receive information about the Virginia lottery from Virginia broadcast media and other sources. App., *infra*, 2a, 6a, 10a-11a; C.A. App. 151, 167-168, 180, 188-189, 195-197, 226-230.

2. Respondent filed this action against the United States and the FCC in October 1988, five months after

acquiring WMYK. Respondent asserted that 18 U.S.C. 1304 and 1307 violate its free speech rights under the First Amendment by preventing it from broadcasting Virginia lottery advertisements. Petitioners defended the statutes on the ground, inter alia, that they are a permissible regulation of commercial speech under the test announced in *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557 (1980). The first inquiry under *Central Hudson* is whether the speech concerns a lawful activity and is not misleading. The second prong asks whether the government's interests in regulating the speech are "substantial." The third inquiry is whether the regulation "directly advances" the government's interests, and the fourth prong asks whether the government's regulation is "no more extensive than is necessary to serve" its interests. 447 U.S. at 566; see *Board of Trustees* v. *Fox*, 492 U.S. 469, 477-481 (1989). The last two steps "basically involve a consideration of the 'fit' between the legislature's ends and the means chosen to accomplish those ends." *Posadas de Puerto Rico Assocs.* v. *Tourism Co.*, 478 U.S. 328, 341 (1986); *Fox*, 492 U.S. at 480.

Acting on a stipulated record, the district court held that Section 1304 and Section 1307 are unconstitutional as applied to respondent. App., *infra*, 10a-38a. After noting that the first step of the *Central Hudson* test was not at issue, *id.* at 20a-21a, the court concluded that the government had a substantial interest in protecting the ability of "non-lottery states to discourage gambling," *id.* at 21a-22a, and that the regulatory scheme was a reasonable means of accommodating the interests of lottery and non-lottery States, *id.* at 27a-28a. Nevertheless, the court ruled

that the broadcast restrictions in Sections 1304 and 1307 did not directly advance the government's interests, because "North Carolinians in Power 94's service area experience pervasive exposure to Virginia lottery advertising through telecast, broadcast and print media" in Virginia. App., *infra*, 26a; see *id.* at 22a-27a. Since application of those statutes to WMYK does not "substantially reduce the volume of advertising about the Virginia lottery" that reaches North Carolina residents, the court ruled, they "fail materially to protect North Carolina residents from the harms which may result from lottery advertising," and therefore fail the third prong of the *Central Hudson* test. *Id.* at 27a.

3. A divided panel of the court of appeals affirmed. App., *infra*, 1a-9a. The majority concluded that Sections 1304 and 1307 satisfied the second and fourth steps of the *Central Hudson* test, App., *infra*, 5a-6a, 7a, but ruled that the laws do not "directly advance" the government's interests as applied to WMYK, *id.* at 7a. Because "[t]he North Carolina residents who might listen to Power 94 are inundated with Virginia's lottery advertisements," the majority reasoned, "[p]rohibiting Power 94 from advertising Virginia's lottery is ineffective in shielding North Carolina's residents from lottery information." *Id.* at 6a-7a.

Judge Widener dissented. App., *infra*, 8a-9a. He reasoned that while WMYK's North Carolina audience might be exposed to lottery information from Virginia, "[t]he fact that the legislation does not uniformly succeed in all instances is no reason to hold it unconstitutional." *Id.* at 9a. He also expressed doubt that the majority's ruling could be confined to what

the majority called "the unique circumstances of this case." *Id.* at 6a, 9a. He pointed out that since "the electromagnetic waves of immense numbers of radio and television broadcasts, probably a majority of them, cross state lines, * * * if our decision is carried to its logical conclusion, as it will be, it will serve to completely invalidate the statutes involved." *Id.* at 9a.

4. The court of appeals denied the government's suggestion of rehearing en banc over the dissent of five judges. App., *infra*, 40a-41a.

REASONS FOR GRANTING THE PETITION

The court of appeals' decision invalidates as applied to respondent two Acts of Congress governing broadcast lottery advertising. In so doing, the court repudiated the bright-line geographic rule that Congress selected in order to balance the interests of lottery and non-lottery States under Sections 1304 and 1307. This repudiation of the line purposefully drawn by Congress rests on several basic errors of First Amendment commercial speech analysis, ignores (literally) this Court's most recent directly analogous commercial speech precedent, *Posadas de Puerto Rico Assocs.* v. *Tourism Co.*, *supra*, and compromises the integrity and workability of a statutory scheme that Congress revisited and decided to maintain only four years ago. Before Congress's judgment about the proper balance of lottery and non-lottery interests is discarded as unconstitutional, review by this Court is warranted.[7]

[7] The panel chose not to publish its divided decision holding an Act of Congress unconstitutional. Whatever may be true in other cases, a decision by a court of appeals invalidating an Act of Congress under the Constitution is no less significant and no less deserving of review by this Court just because that decision is not formally published. This Court has granted review of an unpublished court of appeals' decision in other cases that raised a question warranting review by this Court. See, *e.g.*, *Spectrum Sports* v. *McQuillan*, cert. granted, No. 91-10 (to be argued Nov. 10, 1992); *Commissioner* v. *McCoy*, 484 U.S. 3, 7 (1987) ("We note in passing that the fact that the Court of Appeals' order under challenge here is unpublished carries no weight in our decision to review the case. The court of appeals exceeded its jurisdiction regardless of nonpublication and regardless of any assumed lack of precedential effect of a ruling that is unpublished."); *Rose* v. *Clark*, 478 U.S. 570 (1986). The same course is appropriate here.

1. The court of appeals and the district court were correct that the question presented in this case involves the application of Sections 1304 and 1307 only to non-misleading commercial speech about a lawful activity, the Virginia state lottery. App., *infra*, 5a, 16a-21a, 33a. Those courts also correctly held that Sections 1304 and 1307 satisfy the second and fourth parts of the *Central Hudson* test. App., *infra*, 5a-6a, 7a, 21a-22a, 27a-28a. As shown below, the federal government has a substantial interest in accommodating the lottery policies of the various States, and the broadcast regulatory scheme is narrowly tailored to achieve that end.

a. Sections 1304 and 1307 advance several substantial governmental interests. First, by prohibiting the commercial promotion of private lotteries, they further the policies of States that have forbidden gambling within their borders. Second, by restricting the interstate growth of private lotteries, Section 1304 helps to reduce the threat of organized criminal infiltration of gambling enterprises and makes it easier for the States that allow private lotteries to police

that activity. Third, by allowing state-run lotteries to be advertised, Congress has also allowed the States to maintain what is in effect a local monopoly over lottery activity as a means of raising state revenues.

Those interests are "substantial" under *Central Hudson*. The States historically have had the authority under their police power to prohibit gambling in order to protect their citizens against the harms traditionally associated with that activity. *Posadas*, 478 U.S. at 345; *Champion* v. *Ames (No. 2) (Lottery Case)*, 188 U.S. at 356-356; *Otis* v. *Parker*, 187 U.S. 606, 609 (1903). The States' judgment that gambling can be harmful is not irrational; in fact, this Court expressly so held in *Posadas*. 478 U.S. at 341. Finally, States may treat lotteries in the same manner as they treat any other form of gambling, see *Champion*, 188 U.S. at 355; *Stone* v. *Mississippi*, 101 U.S. 814, 818 (1880); *Phalen* v. *Virginia*, 49 U.S. (8 How.) 163, 167-168 (1850), and Congress can regulate the use of federal communications instrumentalities, such as the mail, to aid the States' efforts to regulate gaming, see *Public Clearing House* v. *Coyne*, 194 U.S. 497, 507 (1904); *In re Rapier*, 143 U.S. at 134-135; *Ex parte Jackson*, 96 U.S. at 736-737. In sum, the regulatory scheme created by Sections 1304 and 1307 advances principles of federalism by helping States implement their policy judgments regarding privately-run and state-conducted gambling.

b. Sections 1304 and 1307 are narrowly tailored to achieve the federal government's and States' desired interests. *Fox*, 492 U.S. at 477-481; *Central Hudson*, 477 U.S. at 566. Congress freed broadcasters to promote lotteries if the station transmits from a State that operates a lottery, while restricting the commercial promotion of lotteries by licensees that

transmit from States prohibiting such activity. This bright-line geographic rule that Congress adopted is certainly a "reasonable" even if "imperfect" fit "whose scope is 'in proportion to the interest[s] served.'" *Fox*, 492 U.S. at 480. As the district court noted, "[s]hort of leaving regulation to the states, it is difficult to envision a more narrowly-tailored set of provisions than those set forth in sections 1304 and 1307." App., *infra*, 28a. Indeed, respondent did not challenge the district court's ruling in this respect in the court of appeals. *Id.* at 7a.

2. The majority nonetheless concluded that Sections 1304 and 1307 could not constitutionally be applied to respondent since they do not "directly advance" the government's interests and therefore do not pass the third part of the *Central Hudson* test for the regulation of commercial speech. The majority's reasoning, however, is flawed in three basic respects, each of which is fatal to the majority's conclusion.

a. The majority's first error was its failure to recognize that Sections 1304 and 1307 are designed to serve not one interest, but two: discouraging lottery participation in the States that do not sponsor lotteries *and* accommodating lottery participation and promotion in the States that do. H.R. Rep. No. 1517, *supra*, at 5; S. Rep. No. 1404, *supra*, at 2. The simultaneous pursuit of these two interests reflects a single unifying purpose with deep roots in federalism: namely, assisting the States in their pursuit of independent social and economic policies.

Under *Central Hudson*, the question is whether Sections 1304 and 1307 "directly advance" the two interests being simultaneously pursued by Congress. The answer to that question is clearly yes. On their

face, Sections 1304 and 1307 directly advance both interests by allowing broadcast lottery advertising in lottery States while prohibiting it in non-lottery States. See S. Rep. No. 1404, *supra*, at 3 ("the accommodation afforded by [Section 1307] meets the essential needs of lottery States without unnecessarily encroaching on non-lottery States"). And even as applied in this case Sections 1304 and 1307 satisfy the direct advancement test, since they allow lottery advertising by Virginia's stations while preventing lottery advertising by a North Carolina station that reaches more than 100,000 North Carolina residents.

The Court has made clear that a legislature is free to restrict one source of commercial speech while allowing another, as Congress has done here, as long as it is reasonably attempting to reconcile competing interests. In *Metromedia, Inc.* v. *San Diego*, 453 U.S. 490 (1981), the Court rejected a First Amendment challenge to a San Diego ordinance that, for safety and aesthetic reasons, banned *offsite* billboard advertising but permitted *onsite* billboard advertising and other specified commercial signs. In upholding the ordinance, the Court deferred to San Diego's policy judgment about the balance to be struck "between the city's land-use interests and the commercial interests of those seeking to purvey goods and services," 453 U.S. at 512 (plurality opinion); *id.* at 541 (Stevens, J., concurring in part and dissenting in part). The Court held that San Diego could resolve this balance in favor of restricting one source of advertising (offsite billboards) but against restricting another source (onsite billboards) without running afoul of *Central Hudson*'s direct advancement test. By the same token, Congress should be free to balance the competing interests of non-lottery and lottery States by restricting

advertising from one source (stations in non-lottery States) while allowing lottery advertising from another source (stations in lottery States). The fact that the results are imperfect does not mean that Sections 1304 and 1307 fail to "directly advance" the balance sought by Congress.

b. The majority limited its attention to only one of the interests served by Sections 1304 and 1307, that of protecting non-lottery States. As just shown, the failure to take account of *both* interests underlying those statutes was error. But even if it were proper to look only to Congress's interest in supporting the policies of non-lottery States, Sections 1304 and 1307 would still pass muster under *Central Hudson* in this case.

In reaching a contrary conclusion, the majority relied on the fact that WMYK's North Carolina audience already receives a substantial volume of Virginia lottery advertising from Virginia media. App., *infra*, 6a-7a. In essence, the majority held that, as applied in this case, Sections 1304 and 1307 are fatally underinclusive: that is, too much commercial speech about the Virginia lottery has been left unrestrained for Sections 1304 and 1307 to "directly advance" Congress's goal in this case. Yet, this Court rejected a similar argument in *Metromedia*, ruling that the San Diego billboard ordinance was not impermissibly underinclusive because of its failure to ban onsite and offsite advertising. 453 U.S. at 511 (plurality opinion); *id.* at 541 (Stevens, J., concurring in part and dissenting in part); accord *Posadas*, 478 U.S. at 342-343.

The majority's underinclusiveness reasoning is misguided since *Central Hudson*'s direct advancement standard is not primarily an empirical test, with

courts gauging the efficacy of a statutory restraint and invalidating it whenever they deem it to be ineffective.[8] Such an approach would involve the judiciary in a quintessentially legislative task. The direct advancement standard asks a different, more qualitative question: whether there is a logical or common sense link, not an indirect or speculative one, between the restraint imposed by Congress and the policies sought to be advanced. See *Posadas*, 478 U.S. at 342 (the direct advancement step is met when the legislative judgment is "a reasonable one"); *Metromedia*, 453 U.S. at 508-509 (plurality opinion) (the direct advancement step is met when the legislative judgment "is not manifestly unreasonable"; accepting "the accumulated, common sense judgments of local lawmakers and of many reviewing courts that billboards are real and substantial hazards to traffic safety"). As long as such a link exists between the restraint imposed and the interests pursued, underinclusiveness does not disable a statute and prevent it from "directly advancing" those interests. Whether the restriction is "worth it" is a judgment for the legislature.

It can hardly be gainsaid that there is a direct connection between restrictions on lottery advertising

[8] This Court arguably undertook such an inquiry in *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60 (1983), in which the Court struck down a federal statute that prohibited the mailing of unsolicited advertisements for contraceptives. Such heightened scrutiny was warranted in *Youngs Drug Products*, however, only because "the underlying conduct that was the subject of the advertising restrictions was constitutionally protected." *Posadas*, 478 U.S. at 345. Here, by contrast, the underlying conduct (gambling) not only is not constitutionally protected, but could be prohibited altogether. *Ibid.*

and lottery participation. This Court held in *Posadas* that a legislature may reasonably conclude that restricting the advertising of gambling will reduce the consumer demand for that activity, and will thereby further the government's interest in protecting the public from the harms associated with gambling. 478 U.S. at 341-342. That ruling is consistent with other decisions by this Court and the lower federal and state courts holding that a legislature reasonably may believe that a restriction on the advertising of alcoholic beverages will reduce alcohol consumption and the injuries drinking can cause.[9] That conclusion also makes economic sense. Banning advertising of a product makes it costly for consumers to learn about and purchase that good, see *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 763-765 (1976); Jackson & Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 Va. L. Rev. 1, 26-28 (1979), and complements a ban on the distribution of that good. In fact, society has historically imposed advertising restrictions to limit the growth of activi-

[9] See *Queensgate Inv. Co.* v. *Liquor Control Comm'n*, 69 Ohio St. 2d 361, 433 N.E.2d 138, 142, appeal dismissed for want of a substantial federal question, 459 U.S. 807 (1982); *Dunagin* v. *City of Oxford*, 718 F.2d 738, 749-750 (5th Cir. 1983) (en banc), cert. denied, 467 U.S. 1259 (1984); *Oklahoma Telecasters Ass'n* v. *Crisp*, 699 F.2d 490, 501 (10th Cir. 1983), rev'd on other grounds *sub nom. Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691 (1984); *S&S Liquor Mart, Inc.* v. *Pastore*, 497 A.2d 729, 734-735 (R.I. 1985); *R.I. Liquor Stores, Ass'n* v. *Evening Call Pub. Co.*, 497 A.2d 331, 335-337 (R.I. 1985); cf. *Republic Entertainment, Inc.* v. *Clark County Liquor & Gaming Licensing Bd.*, 99 Nev. 811, 672 P.2d 634 (1983); *Princess Sea Indus., Inc.* v. *State*, 97 Nev. 534, 635 P.2d 281 (1981), cert. denied, 456 U.S. 926 (1982).

ties deemed harmful, such as alcohol consumption or gambling, and such restrictions have long been considered reasonable.

c. The third shortcoming of the majority's reasoning is its failure to come to grips with this Court's decision in *Posadas*.[10] In that case, this Court upheld a Puerto Rico statute that prohibited advertisements of casino gambling aimed at Puerto Rico residents, but allowed casino advertising aimed at non-residents and allowed other forms of gambling advertising without regard to the target audience. This Court held that the statute "clearly" satisfied the third prong of the *Central Hudson* test because the legislature "reasonabl[y]" believed that advertising of casino gambling aimed at Puerto Rico residents "would serve to increase the demand for the product advertised." 478 U.S. at 342. Relying on *Metromedia*, the Court rejected an argument that the statute was fatally underinclusive because it allowed a variety of other forms of gambling to be advertised to local residents. *Ibid.* Moreover, the Court stated that since the legislature "could have prohibited casino gambling by the residents of Puerto Rico altogether[,] * * * the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling." *Id.* at 345-346.

The majority decision makes no reference to *Posadas*, yet *Posadas* strikes at the heart of the majority opinion. If the "greater power" to ban gambling "necessarily includes the lesser power" to ban

[10] Though discussed extensively by the district court and the parties on appeal, *Posadas* is not even cited by the court of appeals, much less distinguished.

gambling advertising, respondent's claimed First Amendment right to broadcast lottery advertising is wholly without merit. And even if *Posadas* does not make restraints on gambling per se constitutional, it certainly offers strong support for the constitutionality of Sections 1304 and 1307 under *Central Hudson*, both facially and as applied in this case. There is no reason to believe that the target-based restriction on casino gambling advertising in *Posadas*, which exposed the local residents to gambling advertising as long as it was not "aimed" at them, was any more effective, to paraphrase the majority below, at "shielding [Puerto Rico's] residents from [gambling] information," App., *infra*, 7a, than Congress's geographic restriction on lottery advertising here. *Posadas* shows that an added measure of judicial deference is due when a legislature makes a judgment about the effect of advertising restrictions on gambling and similar activities. No such deference can be found in the majority's opinion in this case.

3. The court of appeals' decision in this case is clearly out of step with decisions by this Court and lower federal courts that have addressed the constitutionality of Congress's lottery advertising scheme. This Court has three times previously upheld the constitutionality of that regulatory scheme: The Court twice rejected First Amendment challenges to the predecessor versions of 18 U.S.C. 1302 in *Ex parte Jackson* and *In re Rapier*, and rejected a Commerce Clause challenge to the predecessor to 18 U.S.C. 1301 in *Champion* v. *Ames (No. 2) (Lottery Case)*. In addition, before Congress modified the scheme in 1975 in order to allow advertising of state-run lotteries by certain licensees, the Second and Third Circuits concluded that Congress could alto-

gether prohibit commercial promotion of state-run lotteries. See *New York State Broadcasters Ass'n* v. *United States*, 414 F.2d 990 (2d Cir. 1969); *New Jersey State Lottery Comm'n* v. *United States*, 491 F.2d 219 (3d Cir. 1974) (en banc), vacated and remanded on other grounds for consideration of mootness, 420 U.S. 371 (1975).[11]

Under the decisions by this Court and by the Second and Third Circuits, if Congress had never enacted Section 1307, leaving the unqualified ban on lottery advertising in Section 1304 undisturbed, it could not seriously be maintained that Section 1304 failed to

[11] The Second Circuit upheld the constitutionality of Section 1304 as applied to advertisements or information directly promoting a state-conducted lottery. 414 F.2d at 997, 998. The Third Circuit concluded that Section 1304 would be unconstitutional if it were applied to ban broadcasting of the winning number in a lawful state-run lottery, but also determined that it constitutionally could be applied to compensated broadcasts. 491 F.2d at 224. The Court granted certiorari to review the Third Circuit's ruling, but later ordered the case dismissed as moot after Congress adopted Section 1307. 420 U.S. 371 (1975).

More than a decade later, this Court noted probable jurisdiction over an appeal and a cross-appeal from the district court's decision in *Minnesota Newspaper Ass'n* v. *Frank*, 677 F. Supp. 1400 (D. Minn. 1987), which held that Section 1302 was constitutional as applied to advertisements, but was unconstitutional as applied to prize lists in news reports. After Congress passed legislation affecting the scope of Section 1302 and in light of the government's interpretation of the scope of Section 1302, the private-party plaintiffs dismissed their challenge to Section 1302. See *Minnesota Newspaper Ass'n* v. *Postmaster General*, 488 U.S. 998 (1989) (plaintiff's-cross appellant's voluntary dismissal under Sup. Ct. R. 53 of cross-appeal); *Frank* v. *Minnesota Newspaper Ass'n*, 490 U.S. 225 (1989) (dismissal of government's appeal as moot).

"directly advance" Congress's interest in protecting the policies of the non-lottery States. It is only because Congress *relaxed* the once-absolute prohibition on lottery advertising that the majority below could condemn under the *Central Hudson* direct advancement test the one remaining restriction in the broadcast regulatory scheme. The Fourth Circuit's decision in this case therefore has the perverse effect of condemning Section 1304 and 1307 precisely because those statutes permit *more* speech to be broadcast than would be the case if Section 1307 never had been enacted at all.[12] Nothing in *Central Hudson* or any other commercial speech precedent requires such a perverse result. The inconsistency between the decision below and the regulatory scheme that would be lawful under those precedents requires review by this Court.[13]

[12] Indeed, if WMYK's listeners are as "inundated with Virginia's lottery advertisements" as the court of appeals believed, App., *infra*, 6a-7a, the ruling below is doubly ironic. After all, the speech at issue here is not speech that expresses a political, scientific, or artistic opinion, but is merely speech that proposes a commercial transaction. See *Fox*, 492 U.S. at 473-474; *Posadas*, 478 U.S. at 340; *Virginia State Bd. of Pharmacy*, 425 U.S. at 762. Under the facts discussed by the courts below, there is little (if any) injury to the First Amendment interests of WMYK's audience, and no injury to respondent's ability to engage in discourse. The only injury is to respondent's ability to turn a profit by selling air time for lottery advertisements.

[13] Only four years ago, Congress revisited the question whether the lottery advertising restrictions in Title 18 should be repealed. Instead of repealing this regulatory scheme, Congress decided to add certain additional exemptions. Charity Games Advertising Clarification Act of 1988, Pub. L. No. 100-625, § 2(a), 102 Stat. 3205; Indian Gaming Regula-

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 1992

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tory Act, Pub. L. No. 100-497, § 21, 102 Stat. 2486. Congress retained the bright-line geographic rule adopted in 1974 and rejected proposals to abandon that approach. App., *infra*, 36a-37a. Congress's judgment that the broadcast regulatory scheme as modified serves valuable federal and state interests is entitled to deference from the courts, see *Posadas*, 478 U.S. at 342, which is clearly absent from the decisions below.

APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-2668

EDGE BROADCASTING COMPANY, t/a POWER 94,
PLAINTIFF-APPELLEE

v.

UNITED STATES OF AMERICA; FEDERAL COMMUNICATIONS COMMISSION,
DEFENDANTS-APPELLANTS

Appeal from the United States District Court
for the Eastern District of Virginia, at Norfolk.
Frank A. Kaufman, Senior District Judge
(CA-88-693-N)

Argued: October 31, 1990

Decided: February 27, 1992

Before WIDENER, Circuit Judge, CHAPMAN, Senior Circuit Judge, and HADEN, Chief United States District Judge for the Southern District of West Virginia, sitting by designation.

Affirmed by unpublished per curiam opinion. Judge Widener wrote a dissenting opinion.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

The Federal Communications Commission appeals a judgment construing 18 U.S.C. §§ 1304 and 1307 as governing only commercial speech and holding the application of 18 U.S.C. §§ 1304 and 1307 limiting advertising by a radio station to be an unconstitutional restriction on commercial speech. We affirm.

I.

Edge Broadcasting Corporation (Edge) owns and operates the 100,000 watt radio station WMYK-FM known as "Power 94." Power 94 is licensed by the Federal Communications Commission to Elizabeth City, North Carolina, and broadcasts from Moyock, North Carolina. Moyock is approximately three miles from the North Carolina and Virginia borderline. Corporate offices are located in Virginia Beach, Virginia, and Power 94 carries the dual identification of Elizabeth City, North Carolina, and Virginia Beach, Virginia.

Since Power 94 is located so close to the Virginia and North Carolina borderline, its signal is broadcast to residents of both states. It is estimated that 92.2% of Power 94's listening audience resides in Virginia and that 7.8% of the audience resides in North Carolina. Power 94's signal reaches nine counties in North Carolina. Less than 2% of all North Carolinians reside in those counties.

The State of North Carolina and the Commonwealth of Virginia have adopted opposite views regarding state-sponsored lotteries. A majority of Virginia voters approved a referendum on November 3, 1987, creating a state-run lottery to "produce revenue

consonant with the probity of the Commonwealth and the general welfare of the people." Virginia Code Ann. § 58.1-4001 (1987). In North Carolina, to the contrary, it is a criminal offense to operate a lottery and that state does not sponsor a lottery. N.C. Gen. Stat. §§ 14.289 and 14.291 (1983). Edge derives most of its advertising income from Virginia-based companies and seeks to participate in the very substantial expenditures Virginia makes in advertising its lottery. Edge has refrained from broadcasting information regarding the Virginia lottery for fear of violating federal law.

As part of a federal regulatory scheme of state lotteries, 18 U.S.C. §§ 1304 and 1307 provide in pertinent part as follows:

> 1304. Whoever broadcasts by means of any radio station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or any information concerning any lottery, gift enterprise, or similar scheme . . . shall be fined not more than $1,000 or imprisoned not more than one year, or both.
>
> 1307. (a) [An exemption from criminal liability under § 1304 is granted for] . . . an advertisement, list of prizes, or information concerning a lottery conducted by a state acting under the authority of state law—
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> • • • • •
>
> (2) broadcast by a radio or television station licensed to a location in that state or an adjacent state which conducts such a lottery.

Pursuant to its regulatory authority, the Federal Communications Commission "may revoke any station

license . . . (6) for violation of section 1304." 47 U.S.C. § 312(a). Since Power 94 is licensed to North Carolina, a non-lottery state, the station is prohibited from advertising Virginia's lottery and it may suffer possible revocation of its license if it refuses to comply with the regulations.

Edge brought an action challenging the constitutionality of 18 U.S.C. §§ 1304 and 1307 as applied to prohibit Power 94's broadcasting of Virginia lottery advertisements and information. The district court construed sections 1304 and 1307 as relating only to commercial speech and held that the application of these sections to Edge's operation of Power 94 is a constitutionally invalid restriction on commercial speech. From this order the Federal Communications Commission appeals.

II.

Under First Amendment analysis, a lesser degree of protection is accorded commercial speech than other constitutionally guaranteed expressions.* Commercial speech is accorded " 'a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values,' and is subject to 'modes or regulation that might be impermissible in the realm of noncommercial expression.' " *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 477 (1989) (*citing Ohrlik v. Ohio State Bar Ass'n.*, 436 U.S. 447, 456 (1978)). Al-

* The parties are in agreement that 18 U.S.C. §§ 1304 and 1307 cannot be applied to restrict noncommercial speech about the Virginia lottery. Consequently, listings of prizes and winners and more general news accounts of lottery activities are fully protected by the First Amendment. *See First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

though commercial advertising is entitled to less protection under the First Amendment than noncommercial speech, "commercial speech that is not false or deceptive and does not concern unlawful activity . . . may be restricted only in the service of a substantial government interest, and only through means that directly advance that interest." *Zauderer v. Office of Disciplinary Council*, 471 U.S. 626, 638 (1985). In order to uphold the constitutionality of a regulation on commercial speech, the government must establish that the restriction "directly advances a substantial government interest." *Id.* at 641.

The test for determining the constitutionality of a restriction on commercial speech is as follows:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial free speech to come within that provision, [1] it at least must concern lawful activity and not be misleading. Next, we ask [2] whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must [3] determine whether the regulation directly advances the governmental interest asserted, and [4] whether it is not more extensive than is necessary to serve that interest.

Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557, 566 (1980).

Edge's desire to broadcast Virginia lottery information clearly meets the first prong of the *Central Hudson* test. Virginia's lottery is a lawful activity and previous advertisements were not misleading.

The governmental interest asserted in regulating lottery information is the furtherance of fundamental tenets of federalism which permit non-lottery states

to discourage gambling. Although Edge argues that discouraging gambling is not a substantial governmental interest under the second prong of the *Central Hudson* test, the governmental interest asserted is similar to other "substantial" interests recognized as meeting this prong. *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. at 568-69 (a state law restriction on utility advertising designed to reduce energy consumption); *Oklahoma Broadcasters Association v. Crislip*, 636 F. Supp. 978 (W.D. Okla. 1985) (a state statutory prohibition upon liquor advertising intended to reduce consumption of alcohol). Edge argues that this interest is not sufficiently substantial because some thirty-three states now sponsor their own lotteries. Nevertheless, as the district court noted, the second prong of the *Central Hudson* test is not a strict one and the government has satisfied it in this case.

The third prong requires that a restriction on commercial speech directly advance the interest of the jurisdiction whose legislation is challenged. "Ineffective or remote support" fails to justify an infringement on First Amendment free speech. *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. at 564. Under the unique circumstances of this case, the government's goal to preserve state lottery policies is not advanced by precluding Power 94 from broadcasting Virginia lottery advertisements. Approximately 127,000 North Carolina residents are within Power 94's broadcast range. These listeners, who comprise less than 2% of North Carolina's total population, receive most of their radio, newspaper and television communications from Virginia-based media. The North Carolina residents who might listen to Power 94 are inundated

with Virginia's lottery advertisements. Simply put, the North Carolina residents which the statutes purport to protect already are exposed to numerous Virginia Lottery advertisements through telecast, broadcast and print media. Prohibiting Power 94 from advertising Virginia's lottery is ineffective in shielding North Carolina residents from lottery information. This ineffective or remote measure to support North Carolina's desire to discourage gambling cannot justify infringement upon commercial free speech.

The fourth prong of the *Central Hudson* test provides that a restriction on commercial speech may be "no more extensive than necessary to further the state's interests . . . ." 447 U.S. at 569-70. Under this standard, the regulation must be one "that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective." *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 480 (1989). The district court concluded that the lottery advertisement regulations met this standard. Neither party objects to this finding and we concur with the district court's reasoning.

Thus, in this case 18 U.S.C. §§ 1304 and 1307 fail the *Central Hudson* test since the regulations do not directly advance the governmental interest asserted. Since the regulations as applied to Edge Broadcasting fail to meet the third prong of the *Central Hudson* test, they work an unconstitutional restriction on commercial speech.

III.

The Federal Communications Commission additionally argues that the district court improperly used an "as applied" standard when evaluating Edge's

challenge to 18 U.S.C. §§ 1304 and 1307. We disagree.

An "as applied" challenge is proper when testing the validity of facially valid restrictions on political speech. *Hess v. Indiana*, 414 U.S. 105 (1973). The same is true under commercial free speech analysis. An "as applied" analysis should be performed to test the constitutionality of a particular application of a law prior to addressing any other constitutional challenges. *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469 (1989). If a regulation on commercial speech cannot pass constitutional muster "as applied," then the constitutional analysis is concluded. Accordingly, the district court properly used an "as applied" analysis when testing the constitutionality of the challenged provisions.

IV.

Based on the foregoing reasons, we conclude that the district court properly held that 18 U.S.C. §§ 1304 and 1307 are an unconstitutional restriction on commercial speech as applied to advertisements concerning Virginia's lottery by Power 94 and Edge Broadcasting. Accordingly, the decision below is hereby

AFFIRMED.

WIDENER, Circuit Judge, dissenting:

I respectfully dissent.

I disagree with the majority's analysis of the third prong of the *Central Hudson* requirement.

As the majority correctly recites, the interest of the United States is to preserve state lottery policies, and that is explicitly expressed in 18 U.S.C. §§ 1304 and 1307. I think it a mistake to hold, as we do,

that those statutes as applied are invalid because less than 2% of North Carolina's total population are exposed to the broadcast of WMYK-FM. And the fact that such 2% may be exposed to the broadcasts from Virginia does not alter the fact that Congress has the undoubted right to enact the legislation which it did. The fact that the legislation does not uniformly succeed in all instances is no reason to hold it unconstitutional.

Another objection to this decision is that as a practical matter the electromagnetic waves of immense numbers of radio and television broadcasts, probably a majority of them, cross state lines, so if our decision is carried to its logical conclusion, as it will be, it will serve to completely invalidate the statutes involved.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

Civil Action No. 88-693-N

EDGE BROADCASTING COMPANY, t/a POWER 94,
PLAINTIFF

v.

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION,
DEFENDANTS

Filed: February 23, 1990

KAUFMAN, Senior District Judge.*

Edge Broadcasting Corporation (Edge), a corporation with its principal place of business in Virginia Beach, Virginia, has, since 1988, operated the 100,000 watt radio station WMYK-FM known as "Power 94." That station is licensed by the Federal Communications Commission (FCC) to Elizabeth City, North Carolina, and broadcasts from Moyock, North Carolina, which is located approximately three miles

* Frank A. Kaufman, Senior U.S. District Judge for the District of Maryland, sitting by designation.

south of the border between Virginia and North Carolina. Power 94 is one of twenty-four commercial radio stations serving the Hampton Roads, Virginia metropolitan area. According to Arbitron survey estimates,[1] approximately 92.2% of the persons who comprise Power 94's listening audience reside in Virginia, and approximately 7.8% reside in North Carolina. Although the station's signal reaches nine counties in North Carolina, fewer than 2% of all North Carolinians reside in those counties.

Edge challenges the constitutionality of two provisions of the federal lottery statute, namely, 18 U.S.C. §§ 1304 and 1307, which provide in pertinent part as follows:

> § 1304. Whoever broadcasts by means of any radio station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme . . . shall be fined not more than $1,000 or imprisoned not more than one year, or both.
>
> § 1307. [An exemption from criminal liability under section 1304 is granted for] (a) . . . an advertisement, list of prizes, or information concerning a lottery conducted by a State acting under the authority of state law—
>
> . . .
>
> (2) broadcast by a radio or television station licensed to a location in that state

[1] The parties seemingly have each treated as reliable those survey estimates by the Arbitron Ratings Company.

or an adjacent State which conducts such a lottery.

Corresponding regulations embodying the same substantive restrictions on lottery advertising as those statutory provisions are contained in 47 C.F.R. Part 73.1211. Those regulations also state that the FCC "may revoke any station license . . . (6) for violation of section 1304." An additional statute also provides for a civil forfeiture penalty not to exceed $1,000 in the event of a section 1304 violation. 47 U.S.C. § 503(b)(1)(E).

The State of North Carolina does not sponsor a lottery, and its statutes make participation in and advertising of nonexempt raffles and lotteries a misdemeanor. N.C. Gen. Stat. §§ 14.289 and 14.291 (1983). On the other hand, the Commonwealth of Virginia is authorized by Virginia statute to sponsor a lottery, Va. Code Ann. § 58.1-4001 (1987), and since 1988, has conducted a series of lottery games.

In 1988, the Commonwealth paid $1,285,141 in advertising costs to the media. In 1989, the Virginia Lottery Board estimated that those expenditures would reach in that year $2.3 million, including advertising over seven Hampton Roads radio stations. In addition, certain private businesses, located in the Hampton Roads area, include references in their own radio advertising to their status as lottery ticket outlets. According to Arbitron estimates, 38% of all radio listening in the area reached by Power 94 is directed to Virginia stations which include in their programs broadcasts of lottery advertising.

In addition to radio advertising, the Lottery Board purchases advertising space in the Hampton Roads area's two large newspapers, both of which also circulate in the North Carolina counties reached by

Power 94's signal. Further, the Board presently spends nearly half of its advertising budget on television time, including purchases of time on four Hampton Roads television stations which reach the nine North Carolina counties served by Power 94 as well as additional areas of that state. Arbitron surveys estimate that 64% of all television viewing in those nine North Carolina counties is directed to Virginia television stations which carry such lottery advertising.

Edge estimates that it derives more than 95% of its local advertising revenues from sources in the State of Virginia, and alleges that its fear of being subjected to section 1304's criminal penalties has caused it to refrain from broadcasting any advertisements promoting the Virginia lottery. Power 94 has not sold advertising time to the State of Virginia for the broadcast of lottery promotions or to private businesses for advertising of their status as lottery outlets. As a result, Edge estimates that it has lost, and will continue to lose, advertising revenues totalling in the millions of dollars. To date, Edge has not been threatened with prosecution under section 1304. Specifically, in this case, plaintiff seeks a declaratory decree that sections 1304 and 1307 together with the corresponding FCC regulations, as applied to Edge, violate the First Amendment, and the Equal Protection Clause of the Fourteenth Amendment, of the Constitution of the United States, and further seeks injunctive protection against enforcement of those statutes and regulations.

After alternate motions to dismiss and for summary judgment filed by the United States pursuant to Rules 12(b) and 56 of the Federal Rules of Civil Procedure were denied by this Court, counsel for

both sides submitted this case for a decision by this Court on agreed facts, and presented written and oral legal arguments. For the reasons stated *infra*, this Court concludes that plaintiff is entitled to the relief it seeks in this case.

I.

The prohibition in sections 1304 and 1307 against the radio broadcast of lottery advertising and information by licensees located in non-lottery states is part of a comprehensive scheme of federal legislation regulating interstate transportation and mailing of lottery information. More than 100 years ago, Congress enacted a complete ban on the importation, mailing and advertisement of lotteries, *Ex parte Rapier*, 143 U.S. 130, 133 (1892), and extended that prohibition to radio broadcasting by the Communications Act of 1934,[2] *National Broadcasting Co. v. United States*, 347 U.S. 284, 289 (1954).

"The right of free speech does not include . . . the right to use the facilities of radio without a license. The licensing system established by Congress in the Communications Act of 1934 was a proper exercise of its power over commerce." *National Broadcasting Co. v. United States*, 319 U.S. 190, 227 (1943). Although, as Justice White has written, "broadcasting is clearly a medium affected by a First Amendment interest," *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386 (1968), the Supreme Court has indicated that Congress possesses greater latitude to regulate broadcasting than other forms of communication. For example, in *Bolger v. Youngs Drug Product Corp.*, 463 U.S. 60, 74 (1983), Justice Marshall observed: "Our decisions have recognized that the special interest of the federal Government in regulation of the broadcast media does not readily translate into a justification for regulation of other means of communication." (Footnote and citations omitted). And in *National Broadcasting Co. v. United States*, 347 U.S. at 289, the Supreme Court specifically extended to radio coverage the power of Congress constitutionally to restrict the interstate dissemination of lottery materials recognized in *Ex parte Rapier*, 143 U.S. at 133. *See also New York State Broadcasters Ass'n, Inc. v. United States*, 414 F.2d 990, 996 (2d Cir. 1969), *cert. denied*, 396 U.S. 1061 (1970).

[2] The predecessor of 18 U.S.C. § 1304 is the former section 316 of the Communications Act of 1934, which, at the time of its passage in 1934, imposed criminal penalties upon any licensed radio broadcaster who "knowingly permits the broadcasting of, any advertisement of or information concerning any lottery . . . ."

II.

Section 1304's language prohibiting the broadcast of "any advertisement . . . or information" concerning lotteries by stations licensed to locations in non-lottery states is so broad that it seemingly reaches noncommercial as well as commercial speech. "The Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression." *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 562-63 (1980).

As Justice Scalia has recently written, commercial speech only enjoys " 'a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values,' and is subject to 'modes of regulation that might be impermissible in the realm of noncommercial expression.' *Ohralik v.*

Ohio State Bar Assn, 436 U.S. 447, 456 (1978)." *Board of Trustees of the State Univ. of New York v. Fox*, —— U.S. ——, 106 L.Ed.2d 388, 402 (1989). In contrast, content-based restrictions on noncommercial speech meet First Amendment standards "only in the most extraordinary circumstances." *Bolger*, 463 U.S. at 65. In *Bolger*, Justice Marshall noted that when such restrictions have been upheld, they have fallen into a few "specialized and limited categories" such as "libel," "obscenity," or "fighting words." *Id.* at 65, n.7.[3] Thus, at the outset, the question arises as to whether section 1304 bars only communication which does "no more than propose a commercial transaction," *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 385 (1973), or whether it also reaches noncommercial information. In this case, this Court's task with respect to section 1304's application to noncommercial speech is rendered considerably easier by the government's statement in oral argument that the government would not oppose a decree limiting the application of section 1304 to Power 94's operations to the realm of commercial speech. That position accords with decided case law. For example, Judge Feinberg avoided invalidating section 1304 on First Amendment grounds by concluding that "the phrase 'information concerning any lottery' refers only to information that directly promotes a particular existing lottery" and does not prohibit the broadcasting of, for example, "an editorial for or against continuing the lottery experiment started by New York State in 1967." *New York Broadcasters Ass'n*, 414 F.2d at 997. *See*, to the same effect, *New Jersey State Lottery Comm'n*

[3] Seemingly, one should add to this list speech intended and likely to incite imminent lawless action. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

v. United States, 491 F.2d 219, 224 (3d Cir. 1974) (Gibbons, J.) (en banc), *vacated as moot and remanded*, 420 U.S. 371 (1975); *Minnesota Newspapers Ass'n v. Postmaster General*, 677 F. Supp. 1400 (D. Minn. 1987), *vacated as moot and remanded*, 109 S.Ct. 1734 (1989).[4]

[4] In *New Jersey State Lottery*, a radio station licensed to the state sought a declaratory decree that section 1304 did not apply to the broadcast of a winning number in the New Jersey state-operated lottery. After the Third Circuit granted the petitions of the states of New Hampshire and Pennsylvania to intervene and after the Circuit, sitting en banc, reversed the ruling of the FCC adverse to that contention, the Supreme Court granted certiorari. However, thereafter, as it later did in *Minnesota Newspapers*, the Supreme Court vacated as moot the judgment below, in the light of the 1974 amendments to section 1307 which replaced what was in essence a blanket ban on lottery information broadcasts with the current statutory scheme. Dissenting, Justice Douglas wrote, *inter alia*, in a starred unnumbered footnote:

> As the State of New Hampshire points out, the new § 1307 even on its face does not resolve the claims of all parties to this action. New Hampshire, which was granted leave to intervene in the Court of Appeals, conducts a lottery; neighboring Vermont does not. Title 18 U.S.C.A. § 1307(a)(2) (Supp. Feb. 1975), upon which the court relies, applies only to broadcasts by a station in the State which conducts the lottery, or in an adjacent State which also conducts a lottery; presumably, then, § 1304 remains applicable to a Vermont radio station which desires to broadcast information concerning the New Hampshire lottery. The restraint imposed by § 1304 will thus continue to inhibit the New Hampshire lottery with respect to certain groups of prospective participants, including New Hampshire residents who listen to Vermont radio stations and Vermont residents who might wish to cross the state line and participate.

United States v. New Jersey State Lottery Comm'n, 420 U.S. 371, 375 (1975). In this case, the questions which arise

Power 94 alleges that it has not broadcast any information about the Virginia lottery, including news accounts of winning numbers and other announcements about the Virginia lottery, out of fear of prosecution under section 1304. To the extent that it may constitutionally restrict noncommercial speech, section 1304 must then either serve a compelling state interest or fall within one of the exceptions developed by the Supreme Court in *Bolger*. It does neither. No party has suggested that lottery information is either libelous or obscene, incites lawless action or constitutes "fighting words." As such, the broadcast of noncommercial lottery information falls into none of the exceptions from strict scrutiny.

In fact, the very reasons advanced herein by the government in support of its position with relationship to commercial speech indicate that as to noncommercial speech there are lacking compelling state interests. The purpose articulated by Congress for prohibiting non-lottery state broadcasts was to "free[] the means of communication to State-run lotteries to the maximum extent possible consistent with adequate Federal recognition of and protection for the policy of non-lottery States." S. Rep. 93-1404, 93rd Cong., 2d Sess. 3 (1974). A state's desire to limit the participation of its residents in lotteries sponsored by one or more other states, and the federal government's policy of honoring that preference, simply do not rise to the level of the type of compelling state interests articulated in *Bolger* and, thus, do not justify reading section 1304's restrictions so as to cover noncommercial lottery information. In follows, as the government does not oppose in this

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are, of course, similar to those to which Justice Douglas so referred.

case, that sections 1304 and 1307 should not be read to prohibit Power 94 to broadcast noncommercial information about lotteries.

III.

While commercial advertising is entitled to less protection under the First Amendment than noncommercial speech, it nonetheless has been afforded significant First Amendment safeguards since it "not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information." *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 561-62 (1980). "Commercial speech that is not false or deceptive and does not concern unlawful activity . . . may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 638 (1985), citing *Central Hudson Gas*, 447 U.S. at 566. The proponent of any such restriction has the burden of establishing that such restriction "directly advances a substantial government interest." *Id.* at 641.

In *Central Hudson Gas & Electric Corp.*, Justice Powell enunciated a four-part analysis for determining the constitutionality of a restriction on commercial speech:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial free speech to come within that provision, it must at least concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must

> determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Id. at 566. That four-part test has been uniformly accepted as the analytical framework for determining the constitutionality of restrictions upon commercial speech. *See, e.g., Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 340 (1986); *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 507 (1981); *Oklahoma Broadcasters Ass'n v. Crisp*, 636 F. Supp. 978, 980-81 (W.D. Okla. 1985).

IV.

In *Central Hudson*, Justice Powell reiterated the principle that "[t]he First Amendment's concern for commercial speech is based on the informational function of advertising." *Id.* at 563. Thus, the first prong of the *Central Hudson* test examines whether the activity spoken of is lawful and whether the information imparted is truthful. "[T]here can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity." *Id.*

Power 94 wishes to broadcast advertising about the Virginia lottery sponsored by both the state itself and private sales outlets located in the Hampton Roads areas. The Virginia lottery was lawfully created by the state's voters in a November 3, 1987 referendum and established by Virginia statute. Va. Code Ann. § 58.1-4001 (1987). The legality of advertising about the Virginia lottery is thus undisputed.

Similarly, defendants do not suggest that the advertising at issue in this case would be misleading

or deceptive. Indeed, the government has acknowledged that the content Edge wishes to broadcast is truthful. Thus, Edge has no difficulty meeting in this case the first prong of the *Central Hudson* test.

The second prong of that test concerns the substantiality of the government interest. In this litigation, the government characterizes the interests served by sections 1304 and 1307 as the furtherance of fundamental interests of federalism enabling non-lottery states to discourage gambling. Those interests are similar to other "substantial" interests which have been accepted as complying with *Central Hudson*'s second standard. For example, a state statutory prohibition upon liquor advertising—a restriction designed to reduce consumption of alcohol—has been upheld, *Oklahoma Broadcasters Ass'n v. Crisp*, 636 F. Supp. at 982; and a state law restriction on utility advertising designed to reduce energy consumption has been recognized as valid, *Central Hudson*, 447 U.S. at 568-69. In those cases, state laws have been involved. Herein, it is federal legislation whose validity is at issue. But Congress may assist states in inhibiting activity considered by a state to be contrary to public policy by regulating the promotion by radio broadcasting. *See New York State Broadcasters*, 414 F.2d at 996-97 (substantial government interest served in federal ban on lottery advertising); *Banzhaf v. FCC*, 405 F.2d 1082, 1101 (D.C. Cir. 1968) (FCC regulation of cigarette advertising intended to reduce cigarette consumption implied).

More than a century ago, in *Ex parte Rapier*, 143 U.S. at 133, the Supreme Court sustained the constitutionality of precursor provisions to 18 U.S.C. § 1302, a statute barring use of the mails for lottery promotion and the basis for the predecessor provision

to section 1304. Although both social attitudes and legal proscriptions regarding gambling have seemingly eased in the intervening century, the desire of a state to regulate gambling is still respected by the courts. Thus, in 1986, in *Posadas*, the Supreme Court upheld Puerto Rican legislation restricting the advertising of casino gambling. *Posadas*, 478 U.S. at 341. Edge, in support of its contention that the interest of the State of North Carolina is not sufficiently substantial, emphasizes the fact that attitudes with respect to lotteries have changed dramatically in past decades, to the point where at least 33 states now sponsor their own lotteries. Further, Edge asserts that section 1307's exemption for broadcasters located in states where lotteries are legal acknowledges that the interest in reducing consumption is insubstantial and, morever, that interests of federalism are in this day and age best served by leaving decisions concerning lottery advertising to the states.

The "substantial interest" standard, *i.e.*, the second prong of the *Central Hudson* test, is not a strict one. Thus, in *Posadas*, the Supreme Court recognized Puerto Rico's substantial interest in the reduction of gambling, even though the regulation at issue in that case only restricted selected forms of advertising of casino gambling while permitting advertising of other forms of gambling. *Posadas*, 478 U.S. at 344. In that context, the federal government's interest in protecting the desires of a non-lottery state, *i.e.*, North Carolina, to limit lottery participation must still be termed "substantial."

The third prong of the *Central Hudson* test requires that a restriction on protected commercial speech directly advance the interest of the jurisdiction whose legislation is challenged. If a prohibition

provides only "ineffective or remote support" for such objective, it fails under the First Amendment. *Central Hudson*, 447 U.S. at 564. The facts of this case demonstrate that sections 1304 and 1307 constitute ineffectual means of reducing lottery participation by the North Carolina residents in Power 94's service area because the North Carolina residents within the area of Power 94's signal receive most of their radio, newspaper and television communication from Virginia-based media. It is probably true that a relatively small number of North Carolina listeners who listen only or mainly to Power 94 may hear significantly less lottery advertising because of their allegiance to that station, and that other North Carolinans may hear slightly less lottery advertising because they occasionally listen to Power 94. However, those possibilities do not sufficiently constitute "direct advancement" of the state's interest under the third prong of the *Central Hudson* test which makes clear that "conditional and remote eventualities simply cannot justify silencing . . . promotional advertising." *Id.* at 569. In *Central Hudson*, the Supreme Court held that New York State did not meet its burden of demonstrating that a ban on utility company advertising would directly advance the goal of promoting fair and efficient rates. *Id. See also Bolger*, 463 U.S. 60, 73 (1983), in which, dealing with a First Amendment challenge to a federal postal ban on the mailing of unsolicited contraceptive advertisements, the Supreme Court rejected the state's premise that the regulation sufficiently advanced the goal of aiding parents' efforts to supervise their children's birth control education. Since parents already largely control the receipt of household mail, and since children are exposed to significant external in-

formation, the statute offered "only the most limited incremental support for the interest asserted," and thus, failed First Amendment scrutiny. *Id.* at 73.[5]

Similarly, in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), the Supreme Court insisted that a state government must identify a direct link between the interest asserted and the regulation at issue. Rejecting the argument of the State of Ohio than a ban on the use of illustrations in attorney advertising advanced the goal of preventing deceptive promotion of legal services, Justice White observed that "acceptance of that State's argument would be tantamount to adoption of the principle that a state may prohibit the use of pictures or illustrations in connection with advertising of any product or service simply on the strength of the general argument that the visual content of such advertisements may, under some circumstances, be deceptive or manipulative. But as we stated above, broad prophylactic rules may not be so lightly justified if the protections afforded commercial speech are to retain their force." *Id.* at 649.

Like the prohibition in *Zauderer*, the application of section 1304 to Edge can only speculatively advance the goals of the State of North Carolina. Moreover, to the extent that that provision does reduce lottery participation by North Carolina residents, that reduction is necessarily so slight as to be the kind of "remote" support rejected in *Central Hudson*

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[5] *Bolger* does suggest, however, that a broadcast ban on contraceptive advertising may perhaps pass First Amendment scrutiny on the grounds that parents have less control over the television viewing habits of their children than with regard to receipt and reading of mail by children. 463 U.S. at 74.

as not "directly advanc[ing]" either interests of federalism or limitations on lottery sales. *Central Hudson*, 447 U.S. at 564.

At most, the goals of sections 1304 and 1307 are only implicated in this case with respect to the 8% of Power 94's listening audience which resides in the nine counties of North Carolina within the station's signal. The population of those nine counties is 127,000, less than 2% of North Carolina's total population, but still a sizeable population group. However, a significant number of residents of that area listens to broadcasts of Virginia-based radio station, views Virginia-based television and reads Virginia newspaper advertising. Thus, application of section 1304's advertising ban to the activities of Power 94 hardly more than "remotely" and "marginally" advances the goals of the State of North Carolina to limit the knowledge of North Carolinians about the Virginia lottery. According to Arbitron estimates, 79% of all radio stations whose broadcast signals reach the nine North Carolina counties served by Power 94 are licensed to Virginia locations and may advertise Virginia lottery promotions; approximately 62% of all radio listening by residents in those counties is directed to radio stations licensed to locations in Virginia; and 38% of the radio listening in the Power 94 service area is directed at stations which broadcast lottery advertising. Only 11% of the radio listening in the nine-county area is directed at Power 94. Thus, in fact, radio listeners in that area are more than three times more likely to be listening to a station broadcasting Virginia lottery promotions than to Power 94.

Also, residents of the nine-county area are exposed to significant lottery advertising on television. Sur-

veys [6] indicate that while American adults spend 29% of their media consumption time listening to the radio, they spend 60% watching television. Not surprisingly, the Virginia Lottery Board has spent nearly half of its advertising budget on television time, including purchases from four Norfolk area television stations. Those stations enjoy large audiences in the nine-county Power 94 service area, as well as in sections of North Carolina not reached by Power 94's signal. Within the nine counties, Arbitron estimates that more than 75% of all television viewing in four of those counties is directed at Virginia stations; between 50 and 75% is directed at Virginia stations in three counties; and between 25 and 50% is so directed in two counties. Therefore, sections 1304 and 1307, at most, have only a remote impact on Virginia lottery sales among North Carolina residents, and can hardly be said "directly [to] advance" the federal government's interests in supporting the goals of the State of North Carolina. Further, newspaper advertising by the Virginia press is a source of additional exposure to lottery advertising in North Carolina. In the nine-county area, the circulation of two Virginia-based newspapers is approximately 10,400 newspapers daily and 12,500 on Sundays.

In sum, North Carolinians in Power 94's service area experience pervasive exposure to Virginia lottery advertising through telecast, broadcast and print media. Presumably, the State of Virginia and local Virginia-based lottery outlets determine their advertising budgets and allocate purchases of advertising

[6] These statistics are taken from surveys conducted by the Television Bureau of Advertising and are set forth in the joint stipulation of facts submitted by both sides in this case.

among available broadcasters. Thus, if Power 94 cannot air lottery promotions, advertisers will simply purchase from other broadcasters, and other media, which direct their messages into the area of North Carolina reached by Power 94. Ultimately, the application of sections 1304 and 1307 does not substantially reduce the volume of advertising about the Virginia lottery which reaches residents of North Carolina. Thus, those statutory provisions fail materially to protect North Carolina residents from the harms which may result from lottery advertising. Given that degree of ineffectiveness, those provisions do not meaningfully address the concerns of North Carolina or federalism's concerns for those state interests, and do not pass muster under the third prong of the *Central Hudson* test. Accordingly, although, for reasons stated *supra*, the challenged federal statutory proscriptions do pass muster under the first two standards of *Central Hudson*, and for reasons stated *infra*, under the fourth standard of that case, Edge is entitled to the relief it seeks herein.

Under the fourth prong of the *Central Hudson* test, a restriction on commercial speech may be "no more extensive than necessary to further the state's interest," 447 U.S. at 569-70. Edge contends that because the federal government's interests could be met by dropping section 1304 and leaving regulation of lottery advertising to the states themselves, the statute fails to meet that standard.

If the *Central Hudson* framework is construed as imposing a "least restrictive alternative" requirement, then that argument by Edge might succeed. But that interpretation is not permitted by *Board of Trustees of the State Univ. of New York v. Fox*, —— U.S. ——, 106 L.Ed.2d 388 (1989), in which Justice

Scalia construed the fourth *Central Hudson* standard as establishing "something short of at least restrictive means standard," *id.* at 401, and described it as one based on "reasonable" legislative judgment, necessitating "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served;' that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective." *Id.* at 404 (citation omitted).

The statutory scheme put in place by sections 1304 and 1307 is not unreasonable. Presumably, in many instances, broadcasters located in non-lottery states will serve substantial populations in those states; under such circumstances, there may well be a "fit" between the statute and its objective. Short of leaving regulation to the states, it is difficult to envision a more narrowly-tailored set of provisions than those set forth in sections 1304 and 1307. Accordingly, those sections do pass muster under *Fox*'s relaxation of the fourth *Central Hudson* standard.

The conclusion, however, as indicated *supra*, does not validate the application of sections 1304 and 1307 to Power 94, because that application violates *Central Hudson*'s third-prong. And, that remains true despite the availability to the government of certain language in *Posadas*, 478 U.S. 328, which arguably supports the opposite conclusion.

V.

In *Posadas*, in the course of applying the four-pronged *Central Hudson* test, Justice Rehnquist concluded that the advertising concerned a lawful activity, was not misleading, and met *Central Hudson*'s

first test. *Id.* at 340-41. Then, he determined that Puerto Rico's interest in protecting the safety and welfare of its residents from the harms associated with gambling was a substantial interest and was valid under the second test. *Id.* at 341. As to the third prong of *Central Hudson*, Justice Rehnquist concluded that the Puerto Rico legislature's premise that the restriction on advertising would decrease gambling was reasonable and that its implementation directly advanced the purpose of the legislation. *Id.* at 343. Finally, as to *Central Hudson*'s fourth prong, viewing the statute as construed by Puerto Rico's Supreme Court, the Justice concluded that the statute was no more restrictive than necessary. *Id.*[7]

The casino which challenged the constitutionality of the statutory application argued that Puerto Rico's legislature having itself legalized casino gambling, could then not attempt to reduce demand for gambling by restrictions upon advertising. Disagreeing, Justice Rehnquist stated that "it is precisely *because* the government could have enacted a wholesale prohibition of the underlying conduct that it is permissible for the government to take the less intrusive step of allowing the conduct, but reducing the demand through restrictions on advertising," *Posadas*,

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[7] The statute and regulations at issue in *Posadas* barred advertising of casino gambling "to the public of Puerto Rico." P.R. Laws Ann. tit. 15, § 77 (1972). While Puerto Rico's state tourism company interpreted the law to bar use of the work "casino" in any advertising which might reach Puerto Rican residents, the Superior Court of Puerto Rico devised a narrowing construction of the statute limiting its prohibition to advertisements intended to "attract the resident" of Puerto Rico. That construction was adopted by Puerto Rico's Supreme Court and accepted by the Supreme Court of the United States. *Posadas*, 478 U.S. at 339.

478 U.S. at 346, and that only "a strange constitutional doctrine . . . would concede to the legislature the authority to totally ban a product or activity, but deny to the legislature the authority to forbid the stimulation of demand for the product or activity through advertising on behalf of those who would profit from such increased demand." *Id.* Relying on that language, the government suggests in this case that, under *Posadas*, commercial speech concerning activities which a state may ban entirely has no First Amendment protection, and that, therefore, restrictions upon advertising of casino gambling, cigarette and alcohol sales, prostitution, and lotteries are not violative of the First Amendment.

Justice Brennan, joined by Justices Marshall and Blackmun in dissent, expressed the view that the majority decision gives "government officials unprecedented authority to eviscerate constitutionally protected expression." *Id.* at 358-59.[8] Justice Stevens, also dismissing, commented that "[w]hether a State may ban all advertising of an activity that it permits but could prohibit—such as gambling, prostitution, or the consumption of marijuana or liquor—is an elegant question of constitutional law." *Id.* at 359. Against that background, during recent hearings concerning section 1304 and related statutory provisions, a Justice Department representative stated that the *Posadas* analysis "certainly contrasts with the approach in *Central Hudson*" and that "it remains to be seen whether the Court in future cases will take" the established *Central Hudson* approach, or rely on

[8] Justice Brennan in his dissent described *Posadas* as "dramatically shrinking the scope of First Amendment protection available to commercial speech." 478 U.S. at 358-59.

Posadas' blanket deference to the legislature.[9] Commentators have also raised questions with regard to what they believe is an inconsistency between Justice Rehnquist's approach in *Posadas* and the standards of *Central Hudson.*[10] To date, however, as far as this Court is informed, neither the Supreme Court nor any lower federal court, in the wake of *Posadas*, has yet held a commercial speech restriction constitutional which would not have passed scrutiny under the traditional *Central Hudson* tests.[11] Accordingly, this Court, in this case, follows *Central Hudson*, and concludes, for the reasons set forth *supra*, that the challenged federal statutory provisions as applied to Power 94 are violative of the third prong of *Central Hudson.*

V. [*sic*]

There remains the question of whether such a holding could and should be avoided by the adoption

[9] Testimony of Douglas W. Kmiec, Dep. Asst. Att'y General, Dept. of Justice, Hearings before the House Judiciary Comm., House Report 100-577, Lottery Advertising Clarification Act of 1988, 100th Cong., 2d Sess. (1988) p.11-12.

[10] D. Lively, "The Supreme Court & Commercial Speech," 72 Minn. L. Rev. 289 (1987); M. Nutt, "Recent Developments in First Amendment Protection of Commercial Speech," 41 Vand. L. Rev. 173, 205 (1988); F. Schauer, "Commercial Speech and the Architecture of the First Amendment," 56 U. Cinn. L. Rev. 1181, 1182 (1988); "The Supreme Court—Leading Cases," 100 Harv. L. Rev. 100, 177-78 (1986) ("Had Justice Rehnquist applied the *Central Hudson* test with vigor, he would have struck down Puerto Rico's law on the ground that it was enacted in pursuit of too insubstantial a purpose to justify the interference with individual choice.").

[11] Nor have the cases which have cited *Posadas*, *see, e.g.*, *U.S. Postal Service v. C.E.C. Services*, 869 F.2d 184, 187 (2d Cir. 1989); *Hillman Flying Service, Inc. v. City of Roanoke*, 652 F. Supp. 1143, 1149 (W.D. Va. 1988), indicated any conflict between *Posadas* and *Central Hudson.*

of narrow constructions of sections 1304 and 1307. Such an approach is generally favored by the courts, *DeBartolo Corp. v. Fla. Gulf Coast Building & Construction Trades Council*, —— U.S. ——, 99 L.Ed.2d 645, 654-55 (1988), and was utilized in *Posadas*, 478 U.S. at 339. Two such constructions are possible: (1) an interpretation of section 1304 eliminating prohibitions on noncommercial speech from the scope of those statutes; and (2) a reading of section 1307 which bars non-lottery state broadcasters only from airing advertising directed at their own residents.

"The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality," *Hooper v. California*, 155 U.S. 648, 657 (1895). That rule has recently been characterized as a "cardinal principle" which "has its roots in Chief Justice Marshall's opinion for the Court in *Murray v. The Charming Betsy*, 12 Cranch 64 (1804), and has for so long been applied by this Court that it is beyond debate." *DeBartolo*, —— U.S. ——, 99 L.Ed.2d at 654. Indeed, the rule is brought into play "so as to avoid not only the conclusion that [a statute] is unconstitutional, but also grave doubts upon that score." *Moore Ice Cream v. Rose*, 289 U.S. 373, 379 (1932). Nevertheless, it is not easy to cite to firm guidelines as to when a given constitutionally dubious statute may be amendable to a narrowing interpretation. In *Crowell v. Benson*, 285 U.S. 22 (1932), Chief Justice Hughes wrote that when contemplating a narrowing construction, a court should "first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided." *Id.* at 62. However, Justice Cardozo later warned that "avoidance of a difficulty will not be pressed to the point of disingenuous evasion." *Moore*, 289 U.S. at 379.

Whether a potential narrowing construction is "fairly possible" or "disingenuous evasion" seemingly turns principally upon legislative intent. In *Moore*, the Court concluded that "the intention of the Congress is revealed too distinctly to permit us to ignore it because of mere misgivings as to power." *Id.* More recently, in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), Chief Justice Burger looked to whether the possibly unconstitutional aspect of a statute was the product of "the affirmative intent of the Congress clearly expressed." *Id.* at 501, quoting *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138, 147 (1957).

In this case, as discussed *supra*, the government does not object to a narrowing construction by which section 1304 is read to cover advertising only and to exclude news. As discussed *supra*, any interpretation of section 1304 which includes a ban on noncommercial speech would render that section unconstitutional Moreover, a construction excluding noncommercial speech from the scope of the statute is "fairly possible." Nothing in the recent legislative history of the federal lottery statute suggests that Congress intended to prohibit the broadcast of lottery information not designed to increase lottery participation.[12]

The second proposed narrowing construction, however, poses considerably greater problems, and materially affects section 1307's exemption for advertising "concerning a lottery conducted by a State acting under the authority of State law . . . broadcast by a radio or television station licensed to a location in that State or an adjacent State which conducts such a lottery." That provision, under the suggested

[12] That history dates from the early 1970's when states first authorized lotteries.

second narrowing construction, would be read to permit broadcasters licensed to non-lottery states—and thus not falling within the specific language of the exception—to air Virginia lottery advertising not directed to North Carolina residents.

Edge contends that that type of construction is similar to the interpretation given in *Posadas* to the Puerto Rico gambling statute by the Superior Court of Puerto Rico. That court narrowly construed a general ban on all advertising of casino gambling "to the public of Puerto Rico" so as to forbid only advertisements "contracted with an advertising agency, for consideration, to attract the residents to bet at the dice, card, roulette and bingo tables." *Id.* at 355. Edge asserts that *Posadas* bestows a kind of "imprimatur" upon a similar narrowing construction of section 1307 by this Court. However, the language of the statutes and the respective circumstances surrounding their enactment are dissimilar.

In *Posadas*, the Court was confronted with general statutory language, to which the Puerto Rican Court supplied specific terms. Moreover, it is practically feasible to identify a series of distinct forms of advertising directed at tourists who, largely, while in Puerto Rico, reside at resort hotels and speak a different native language than do many Puerto Rican residents. In contrast, section 1307's highly specific language expressly exempts a carefully defined set of broadcasters from section 1304's provisions. The basis for the exemption, location of license, accords with the long-standing concept of "community of license" which has been central to the FCC's licensing scheme since the enactment of the Communications Act of 1934. It is not "fairly possible" to interpret that language in a manner which ignores that

statutory concept. In addition, it hardly seems possible for advertising to be designed which will induce Virginian listeners to participate in the lottery and at the same time not attract North Carolina residents. Both groups are members of the same listening audience, and Edge has not provided—and seemingly cannot provide—any evidence of demographic or other differences, or in the content of lottery advertising, which would make advertising directed to non-North Carolinians feasible. In short, the *Posadas* solution cannot be comfortably grafted on the situation in this case.

Perhaps even more important is the fact that the legislative history of sections 1304 and 1307 does not permit such a narrowing construction. Prior to 1974, section 1304 barred the broadcast of all lottery advertising. In that year, section 1307 was added to provide the exceptions currently in effect. In crafting those exemptions, Congress considered a number of alternatives,[13] and was well aware, as the House Report reveals, that basing exceptions upon license location would create inequities, since "broadcast signals, as a technological matter, cannot be confined to political boundaries." [14]

In the 1974 amendments, Congress sought primarily to rectify the situation in which "the policy determinations of some States in authorizing a lottery are inhibited by provisions of Federal law even though the lottery functions only in that State." [15] The House

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[13] H. Rep. No. 93-1517, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 7007, 7010, 7022 [hereinafter cited as H. Rep.].

[14] Letter of FCC Chairman Richard E. Wiley, H. Rep. at 7021.

[15] H. Rep. at 7010-11.

Judiciary Committee specifically acknowledged that section 1307 was an imperfect solution: "in considering this legislation the committee was faced with the task of making a reasonable balance between Federal and State interests in this area," *id.* at 7011, and opted in favor of "protection of the policies and the interests of the States which do not provide for such lotteries." *Id.*

Initially, in 1974, the proposed legislation which became section 1307 limited lottery advertising to stations "located in" lottery states. The FCC then recommended the use of location of license as a more precise criterion, and a letter to the Committee from the FCC chairman set forth the reasoning and implications of that distinction.[16] At that point, the Committee amended its initial draft to include license location language.[17]

In 1988, Congress enacted a series of amendments which permitted lotteries sponsored by nonprofit organizations.[18] The initial proposed amendments in that year[19] contained a provision which would have expanded the section 1307 exemption to all advertising concerning any lottery "conducted by a State acting under the authority of state law," and would have therefore eliminated reliance upon the license location. During hearings, testimony was presented by representatives of the Justice Department and the FCC supporting such an amendment on the ground

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[16] *Id.* at 7021-22.

[17] *Id.* at 7007.

[18] P.L. 100-625, The Charitable Games Advertising Clarification Act of 1988.

[19] *See* P.L. 100-625, HR 3146.

that the existing law produced inequitable results,[20] and the President of the National Association of Broadcasters specifically testified at House Judiciary hearings to the problems experienced by broadcasters —like Edge—licensed to locations near state borders.[21]

The bill did pass the House without the language keyed to location of license. However, in the Senate, the bill was amended to remove the changes in section 1307 concerning broadcast of lottery advertising and to retain language keyed to license location. Eventually, the House concurred with the Senate's action. Thus, Congress, having reconsidered the explicit exemption scheme of section 1307 once again in 1988, essentially ratified it.

In sum, the legislative history of the 1974 and 1988 amendments to the lottery statute reveals that the specific provisions of the section 1307 exception are the result of "the affirmative intention of the Congress clearly expressed." *Catholic Bishop*, 440 U.S. at 501. In that context, it is just not "fairly possible" to construe those provisions so as to ignore Congress' decision to regulate the broadcast of lottery advertising according to the license location of the broadcaster. Accordingly, a contrary narrowing construction, which would avoid the invalidation of the application of sections 1304 and 1307 to Power 94, is not appropriate. In this case, such invalidation is therefore required for the reasons stated *supra*.

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[20] H. Rep. 100-557, 100th Cong., 2d Sess., statements of Dennis Patrick, FCC Chairman, at 7 and Douglas W. Kmiec, Dep. Asst. Attorney General, Dept. of Justice at 9-10 (1987).

[21] Lottery Advertising Clarification Act of 1988, Hearings on H.R. 3146 before the Subcomm. on Ad. Law and Government, House Comm. on the Judiciary, 100th Cong., 2d Sess. 57 (1987) (Testimony of Edward O. Fritts).

CONCLUSION

This Court will enter a Decree in this case construing sections 1304 and 1307 as relating only to commercial speech and holding that the application of sections 1304 and 1307 to Edge's operation of Power 94 is constitutionally invalid as to commercial speech.

/s/ F. A. Kaufman
Senior United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

Civil Action No. 88-693-N

EDGE BROADCASTING COMPANY, t/a POWER 94,
PLAINTIFF

v.

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION,
DEFENDANTS

DECREE

The provisions of 18 U.S.C. §§ 1304 and 1307 do not apply to noncommercial speech and apply only to commercial speech. Further, the application of those statutory provisions to the operation of Power 94 by Edge Broadcasting Corporation (Edge) is unconstitutional insofar as commercial speech is concerned. Accordingly, Edge may operate Power 94 without being subject to the restrictions of those statutes, and defendants are hereby enjoined from taking any action to the contrary. It is so ORDERED, this 23rd day of February, 1990.

/s/ F. A. Kaufman
Senior United States District Judge

APPENDIX D

FILED: May 20, 1992

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-2668

EDGE BROADCASTING COMPANY, t/a POWER 94,
PLAINTIFF-APPELLEE

versus

UNITED STATES OF AMERICA;
FEDERAL COMMUNICATIONS COMMISSION,
DEFENDANTS-APPELLANTS

ORDER

Upon a request for a poll of the court on the suggestion for rehearing en banc, Judges Russell, Widener, Murnaghan, Sprouse and Niemeyer voted in favor thereof, and Judges Ervin, Hall, Phillips, Wilkinson, Wilkins, Hamilton, Luttig and Williams voted against.

It is accordingly ADJUDGED and ORDERED that the petition for rehearing en banc shall be, and the same hereby is, denied.

The panel considered the petition for rehearing and is of opinion it is without merit.

It is accordingly ADJUDGED and ORDERED that the petition for rehearing shall be, and the same hereby is, denied.

Judges Chapman and Haden concur in this order. Judge Widener dissents. He would grant rehearing.

/s/ H. E. Widener, Jr.
For the Court

APPENDIX E

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment provides in part as follows:

Congress shall make no law * * * abridging the freedom of speech, or of the press * * *.

2. 18 U.S.C. 1304 provides as follows:

Broadcasting lottery information

Whoever broadcasts by means of any radio or television station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Each day's broadcasting shall constitute a separate offense.

3. 18 U.S.C. 1307 provides as follows:

Exceptions relating to certain advertisements and other information and to State-conducted lotteries

(a) The provisions of sections 1301, 1302, 1303, and 1304 shall not apply to—

(1) an advertisement, list of prizes, or other information concerning a lottery conducted by a State acting under the authority of State law which is—

(A) contained in a publication published in that State or in a State which conducts such a lottery; or

(B) broadcast by a radio or television station licensed to a location in that State or a State which conducts such a lottery; or

(2) an advertisement, list of prizes, or other information concerning a lottery, gift enterprise, or similar scheme, other than one described in paragraph (1), that is authorized or not otherwise prohibited by the State in which it is conducted and which is—

(A) conducted by a not-for-profit organization or a governmental organization; or

(B) conducted as a promotional activity by a commercial organization and is clearly occasional and ancillary to the primary business of that organization.

(b) The provisions of sections 1301, 1302, and 1303 shall not apply to the transportation or mailing—

(1) to addresses within a State of equipment, tickets, or material concerning a lottery which is conducted by that State acting under the authority of State law; or

(2) to an addressee within a foreign country of equipment, tickets, or material designed to be used within that foreign country in a lottery which is authorized by the law of that foreign country.

(c) For the purposes of this section (1) "State" means a State of the United States, District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States; and (2) "foreign country" means any empire, country, dominion, colony, or protectorate, or any subdivision thereof (other than the United States, its territories or possessions).

(d) For the purposes of subsection (b) of this section "lottery" means the pooling of proceeds derived from the sale of tickets or chances and allotting those proceeds or parts thereof by chance to one or more chance takers or ticket purchasers. "Lottery" does not include the placing or accepting of bets or wagers on sporting events or contests. For purposes of this section, the term a "not-for-profit organization" means any organization that that would qualify as tax exempt under section 501 of the Internal Revenue Code of 1986.

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